IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 411 OF 2002.

Saviour of the World Church,
Salvador do Mundo, represented
by the President of the Fabrica
Fr. Simpliciano N. Fernandes,
Parish Priest, Salvador do
Mundo. ... Petitioner.

Versus

Mr. Joseph Pereira, r/o
Umbra, Salvador do Mundo. ... Respondent.

Mr. S.S. Kantak and Ms. R. Chodankar, Advocates for the Petitioner.

Mr. S.D. Lotlikar, Senior Advocate with Mr. A.D. Bhobe, Advocate for the Respondent.

Coram: P.V. HARDAS, J.

Date: 14th February 2003.

ORAL JUDGMENT.

Rule. Rule made returnable forthwith. By consent of parties, this petition is taken up for final hearing.

2. This petition is at the instant of the original plaintiff in Regular Civil Suit No. 232/2001/D, who, being aggrieved by the Order of the learned Civil Judge, Junior Division, Mapusa, dated 22nd November 2002 in Civil Miscellaneous Application No. 130/02/D, has assailed the aforesaid Order.

3. The brief facts necessary for the decision of the present petition are stated hereunder:-

The present petitioner/plaintiff filed an application under Order XXVI, Rule 9 of the Code of Civil Procedure for appointment of a Commissioner from the Land Survey Department, Government of Goa, to determine the exact location of the kiosk installed by the respondent/defendant and to submit a report accordingly. Apparently, according to the plaintiff, the filing of this application was necessitated on account of a sketch map, which had been filed by the respondent/defendant, after the hearing of the application for temporary injunction had been concluded, pointing out therein that the kiosk of the present respondent/defendant was not situated on the land of the petitioner/plaintiff but was situated on a nullah, which, according to the respondent/defendant, was beyond the property of the petitioner/plaintiff.

4. The learned trial Judge, by the Order impugned in the present petition, gave the following reasons for rejection of the application: (1) the learned trial Court held that the application filed by the petitioner/plaintiff was premature as the application for temporary injunction was pending in the Court and the point to be decided in the said application was whether the kiosk had been re-constructed or was a new construction and also whether the kiosk of the respondent/defendant is situated in the property

belonging to the petitioner/plaintiff, (2) the learned trial Court found that the petitioner/plaintiff had not produced on record any title document but had relied on Form I & XIV pertaining to the suit property and allowing the application of the petitioner/plaintiff would indirectly amount to assisting the petitioner/plaintiff in collecting evidence, and (3) the learned trial Court found that the petitioner/plaintiff had to succeed or fail on the basis of his title, which would be required to be proved on the basis of evidence and could not seek the assistance of the Court for collection of evidence. On the aforesaid reasons, the learned trial Court dismissed the application filed by the petitioner/plaintiff by rightly treating it as an application under Order XXXIX, Rule 7 of the Code of Civil Procedure.

5. Mr. Kantak, the learned counsel appearing on behalf of the petitioner before me, while assailing the Order of the learned trial Court, submitted that the learned trial Court has not taken into consideration whether the appointment of a Commissioner was necessary under Order XXXIX, Rule 7 of the Code of Civil Procedure, but has proceeded to dismiss the said application for reasons, which were not germane. For the decision of the said application, according to the learned counsel for the petitioner, the trial Court had

only to consider whether the Commissioner was necessary for determining the exact location of the said kiosk/gadda and particularly to assist the Court in finally deciding whether the kiosk/gadda was situated on the nullah beyond the property of the petitioner or between the compound wall and nullah. Thus, according to the learned counsel for the petitioner/plaintiff, the Order impugned in the present petition clearly reflects non-application of mind of the learned trial Court to the facts pleaded in the said application for appointment of Commissioner.

6. Mr. Lotlikar, the learned counsel appearing on behalf of the respondent/defendant, while supporting the Order impugned in the present petition, has submitted that primarily it is the responsibility of the petitioner/plaintiff to prima facie establish that the kiosk/gadda is situated in the land of the petitioner/plaintiff. At the time of deciding an application for temporary injunction, one of the material aspects that the Court would be called upon to take into consideration is the place where the kiosk/gadda is situated. Therefore, the appointment of the Commissioner, though under Order XXXIX, Rule 7 of the Code of Civil Procedure, is certainly an attempt on the part of the petitioner/plaintiff for collection of evidence, qua the decision on the application for

temporary injunction.

7. I have given my anxious consideration to the rival submissions of the parties. It is true that the learned trial Court apparently has been swayed by recording a finding that the appointment of the Commissioner under Order XXXIX, Rule 7 of the Code of Civil Procedure would amount to collection of evidence with the assistance of the Court to the extent of the location of the kiosk/gadda in the property of the petitioner/plaintiff. The scope of the application filed by the petitioner/plaintiff does not warrant the drawing of such conclusion. The petitioner/plaintiff in clearest terms has stated in the said application the reason which necessitated the filing of the said application, that is, because of the production of a sketch map regarding the location of the kiosk/gadda of the respondent/defendant. Undisputedly, according to the respondent/defendant, the said kiosk/gadda is situated on the nullah, which is beyond the property of the present petitioner/plaintiff. The exact place where the kiosk/gadda is located would be of vital importance for the decision of the application for temporary injunction, which is pending for adjudication before the trial Court. Ascertainment of the exact place/location of the kiosk/gadda, according to me, would not amount to collection of evidence, which would be of assistance to

either of the parties so as to establish their rival pleas, but, would, to a great extent, assist the trial Court to decide the application when faced with rival submissions. Apparently it seems that the trial Court has not examined the necessity of appointment of a Commissioner under Order XXXIX, Rule 7 of the Code of Civil Procedure but merely proceeded on the assumption that such appointment of Commissioner would be giving an opportunity to the petitioner/plaintiff for collection of evidence.

8. According to me, therefore, the Order, dated 22nd November 2002, passed by the learned trial Court is unsustainable and is, hereby, quashed and set aside. The trial Court shall hear and decide the application according to law. The learned trial Court should not be influenced by any observations made in this Judgment and should independently decide the application, particularly the appointment of Commissions under Order XXXIX, Rule 7 of the Code of Civil Procedure. The learned trial Court to decide the said application as expeditiously as possible. Rule made absolute on the above terms with no order as to costs. Parties to appear before the trial Court on 7th March 2003.

(P.V. HARDAS)
JUDGE.

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